

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASON JEREMY OHM,

Defendant.

Case No. 3:18-cr-00012-HDM-WGC
Case No. 3:20-cv-00360-HDM

ORDER

Before the court is defendant Jason Jeremy Ohm's motion to vacate pursuant to 28 U.S.C. § 2255 (ECF No. 28). The government has responded (ECF No. 30), and Ohm has replied (ECF No. 31).

On January 31, 2018, Ohm was charged by way of indictment with one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g). (ECF No. 1). Pursuant to an agreement, Ohm entered a plea of guilty to the charge. (ECF Nos. 16 & 18). The court thereafter sentenced Ohm to 57 months in prison. (ECF Nos. 23 & 24).

Section 922(g) prohibits the possession of a firearm by several categories of persons, including any person who has been convicted in any court of a crime punishable by a term of more than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his conviction, Ohm had 2 prior felony convictions, including battery with a deadly weapon, for which he received a five-year sentence, and ex-felon in possession of a firearm, for which he received a sentence of twelve to thirty months. When Ohm was charged and entered his plea in this case, the government was not required to

1 prove that he knew he was a felon. *United States v. Enslin*, 327
2 F.3d 788, 798 (9th Cir. 2003). But after Ohm was sentenced, the
3 U.S. Supreme Court concluded that a defendant may be convicted
4 under § 922(g) only if the government proves that the defendant
5 “knew he belonged to the relevant category of persons barred from
6 possessing a firearm.” *Rehaif v. United States*, 139 S. Ct. 2191,
7 2200 (2019). On the basis of *Rehaif* and the government’s failure
8 to charge his knowledge of status, Ohm now moves to vacate his
9 conviction.

10 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
11 vacate, set aside, or correct his sentence if: (1) the sentence
12 was imposed in violation of the Constitution or laws of the United
13 States; (2) the court was without jurisdiction to impose the
14 sentence; (3) the sentence was in excess of the maximum authorized
15 by law; or (4) the sentence is otherwise subject to collateral
16 attack. *Id.* § 2255(a).

17 Ohm argues that the omission of the *Rehaif* element from the
18 indictment violated his Fifth Amendment rights guaranteeing that
19 a grand jury find probable cause to support all the necessary
20 elements of the crime and to not be tried on a fatally defective
21 indictment and his Sixth Amendment rights to notice of the charges
22 and effective assistance of counsel. He also alleges that the
23 defective indictment deprived the court of jurisdiction. The
24 government asserts that Ohm has waived his right to bring these
25 claims, that his claims are procedurally defaulted, and that the
26 government is not required to prove the defendant knew his
27 possession of firearms was unlawful.

As part of his plea, Ohm “knowingly and expressly waive[d] all collateral challenges, including any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.” (ECF No. 16 at 11). Such “[a]n unconditional guilty plea waives all non-jurisdictional defenses and cures all antecedent constitutional defects, allowing only an attack on the voluntary and intelligent character of the plea.” *United States v. Brizan*, 709 F.3d 864, 866-67 (9th Cir. 2013); see also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Espinoza*, 816 Fed. App’x 82, 85 (9th Cir. June 1, 2020) (unpublished disposition) (unconditional plea waiver precludes all Fifth and Sixth Amendment claims except to the extent they contest the court’s jurisdiction or the voluntariness of the plea). Thus, except to the extent Ohm attacks the jurisdiction of the court and asserts deprivation of effective assistance of counsel,¹ his claims are waived.²

Ohm’s jurisdictional argument is without merit. The omission of an element from the indictment does not affect the court’s jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630 (2002); *United States v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir. 2003); see also *United States v. Jackson*, 2020 WL 7624842, at *1 (9th Cir. Dec. 22, 2020) (unpublished disposition) (rejecting the defendant’s argument that omission of the *Rehaif* element deprived

¹ Ohm does not attack the voluntariness of his plea.

² The court agrees with the well-reasoned opinions of several courts that none of the exceptions under *Tollett* to the collateral challenge waiver applies in this case. See, e.g., *United States v. Kelbch*, 2021 WL 96242, at *2 (D. Nev. Jan. 7, 2021).

1 the district court of jurisdiction); *United States v. Burleson*,
2 2020 WL 4218317, at *1 (July 23, 2020) (unpublished disposition)
3 (same); *Espinoza*, 2020 WL 2844542, at *1 (same); *United States v.*
4 *Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020); *United States v.*
5 *Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *United States v. Balde*,
6 943 F.3d 73, 88-92 (2d Cir. 2019); *United States v. Burghardt*, 939
7 F.3d 397, 402 (1st Cir. 2019). *Cf. United States v. Singh*, 979
8 F.3d 697, 730 (9th Cir. 2020) (on direct appeal, reviewing omission
9 of *Rehaif* element from indictment for plain error). The indictment
10 otherwise sufficiently states a criminal offense: possession of a
11 firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

12 Moreover, to the extent they are not otherwise waived, Ohm's
13 claims are procedurally defaulted.

14 "If a criminal defendant could have raised a claim of error
15 on direct appeal but nonetheless failed to do so, he must
16 demonstrate" either "cause excusing his procedural default, and
17 actual prejudice resulting from the claim of error," *United States*
18 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is
19 actually innocent of the offense, *Bousley v. United States*, 523
20 U.S. 614, 622 (1998). "[C]ause for a procedural default on appeal
21 ordinarily requires a showing of some external impediment
22 preventing counsel from constructing or raising the claim." *Murray*
23 *v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice "requires
24 the petitioner to establish 'not merely that the errors at ...
25 trial created a possibility of prejudice, but that they worked to
26 his actual and substantial disadvantage, infecting his entire
27 trial with error of constitutional dimensions.'" *Bradford v.*

1 *Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation
2 omitted).

3 Ohm could have raised his claims on direct appeal but did not
4 do so. They are therefore procedurally defaulted. It is unnecessary
5 to resolve whether Ohm can demonstrate cause for the default,
6 because even if he could, he cannot demonstrate prejudice.³

7 Ohm committed the instant offense after receiving a five-year
8 sentence for battery with a deadly weapon and a twelve- to thirty-
9 months sentence for possession of a firearm by an ex-felon. (PSR
10 ¶¶ 32 & 45). Further, Ohm acknowledged in his plea agreement that
11 he had been previously convicted of a felony. (ECF No. 16 at 3-
12 5). Finally, and most importantly, Ohm acknowledged during his
13 plea colloquy both that he possessed the firearm after having
14 sustained a prior felony conviction *and* that he was aware at the
15 time of his offense that he was not allowed to possess a firearm.
16 In light of Ohm's admissions that he knew he was a convicted felon
17 and that he was prohibited from possessing firearms, combined with
18 his criminal history, the court is not persuaded that the outcome
19 of the proceedings would have been any different had the grand
20 jury been presented with, and the indictment had alleged, the
21 *Rehaif* element. He thus suffered no prejudice from the omission of
22 the *Rehaif* element.⁴

23 Ohm argues that he suffered prejudice because he was convicted
24 by a court lacking jurisdiction. For the reasons previously
25

26 ³ Ohm does not argue actual innocence.

27 ⁴ To the extent Ohm has asserted an effective assistance of counsel
28 claim, the claim fails on the same grounds.

1 discussed, this argument is without merit because the errors Ohm
2 complains of did not deprive the court of jurisdiction.

3 Ohm alternatively argues that he is not required to
4 demonstrate prejudice to obtain relief because the omission is
5 structural error.

6 "[C]ertain errors, termed structural errors, might affect
7 substantial rights regardless of their actual impact on an
8 appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263
9 (2010) (internal punctuation and citations omitted). Thus,
10 structural error "warrant[s] habeas relief without a showing of
11 specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063-
12 64 (9th Cir. 2011). "But structural errors are a very limited class
13 of errors that affect the framework within which the trial
14 proceeds, such that it is often difficult to assess the effect of
15 the error." *Marcus*, 560 U.S. at 263 (internal punctuation and
16 citations omitted). Cases in which the Supreme Court has found
17 structural error include total deprivation of counsel, lack of an
18 impartial trial judge, violation of the right to a public trial
19 and an erroneous reasonable-doubt instruction. See *id.* (discussing
20 cases). In contrast, errors that have been found to be non-
21 structural include where the court instructed on an invalid
22 alternative theory of guilt, gave an instruction omitting an
23 element of the offense, or erroneously instructed the jury on an
24 element. *Id.* at 264 (discussing cases).

25 The Ninth Circuit has not yet addressed in a published opinion
26 whether omission of the *Rehaif* element from the indictment is
27 structural error. But it has held that the error is not structural
28 in at least one unpublished decision. See *United States v. Jackson*,

2020 WL 7624842, at *1 n.1 (9th Cir. Dec. 22, 2020). And the First, Third, Fifth, Seventh, Eighth, and Tenth Circuits have concluded that *Rehaif* errors are not structural. *United States v. Patrone*, 985 F.3d 81, 86 (1st Cir. 2021); *United States v. Nasir*, 982 F.3d 144, 171 n.30 (3d Cir. Dec. 1, 2020); *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020); *States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020); see also *United States v. Hill*, 2020 WL 7258551, at *2 n.3 (3d Cir. Dec. 10, 2020) (unpublished disposition); *United States v. Watson*, 820 Fed. App'x 397, 400 (6th Cir. 2020) (unpublished disposition). But see *United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020). This court agrees with the well-reasoned opinions of these courts and concludes that a Rehaif error does not fall within the limited class of errors the Supreme Court has found to be structural.⁵

Finally, Ohm argues that *Rehaif* requires the government to prove not only that he knew that he was a convicted felon but also that he knew he was barred from possessing firearms. Notwithstanding the fact that Ohm admitted to the court that he

⁵ While there is some case law holding that defects in the indictment are structural error, those cases apply only where the claim is timely raised. See, e.g., *United States v. Du Bo*, 186 F.3d 1177, 1179 & 1180 n.3 (9th Cir. 1999) ("We hold that, if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment. . . . Untimely challenges to the sufficiency of an indictment are reviewed under a more liberal standard."). Ohm argues that he raised his argument at the earliest possible opportunity and so the timeliness limitation does not apply. The court does not agree. Ohm could have challenged the indictment well before now. The claim is not timely raised.

1 knew he was barred from possessing a firearm, Ohm's legal argument
2 is also without merit. *United States v. Singh*, 979 F.3d 697, 727
3 (9th Cir. 2020) ("[The defendant] contends that *Rehaif* requires
4 the Government to prove he knew not only his status, but also that
5 he knew his status prohibited him from owning a firearm. But this
6 interpretation is not supported by *Rehaif*).

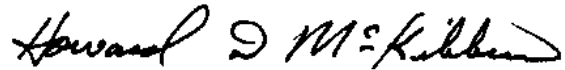
7 Accordingly, because the claims raised in Ohm's § 2255 motion
8 are waived, procedurally defaulted and/or without merit, IT IS
9 THEREFORE ORDERED that the motion to vacate, set aside or correct
10 sentence (ECF No. 28) is hereby DENIED.

11 IT IS FURTHER ORDERED that Ohm is DENIED a certificate of
12 appealability, as jurists of reason would not find the court's
13 denial of the motion to be debatable or wrong.

14 The Clerk of Court shall enter final judgment accordingly.

15 IT IS SO ORDERED.

16 DATED: This 29th day of March, 2021.

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19 UNITED STATES DISTRICT JUDGE
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